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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

LEROY FRANK COLLIER,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Leroy Frank Collier, by and through his attorneys, Frederick R. Bellamy and Neil H. Fink, Petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, affirming his conviction for possession of cocaine with intent to distribute same, in violation of 21 USC §841 (a)(1), conspiracy to import cocaine, in violation of 21 USC §963, and engaging in a continuing criminal enterprise relating to a conspiracy to import and possess cocaine in violation of 21 USC §848.

OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals is not yet reported, but is set forth herein as Appendix A.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was filed March 27, 1974. The jurisdiction of this Court is invoked under 28 USC § 1254(1). An Order Extending Time to File Petition for Writ of Certiorari was signed by the Honorable Potter Stewart, Associate Justice, sitting as Circuit Justice for the Sixth Circuit, on April 23, 1974, extending the time for filing this Petition to and including May 15, 1974.

QUESTIONS PRESENTED

I

Is 21 USC §848, the "continuing criminal enterprise" statute, unconstitutionally vague upon its face, in failing to provide ascertainable standards against which particular behavior may be measured?

II

Must evidence procured under a search warrant based upon an Affidavit which offers the conclusions of the affiant in the guise of fact, and misstates the source of allegations vital to the showing of probable cause, be suppressed?

III

Is a search warrant which does not specifically direct any officer or class of officers to execute the search fatally defective under Rule 41(c), Federal Rules of Criminal Procedure?

IV

When a search warrant names a specific item as the object to be seized, does the Fourth Amendment require that once the sought-for object is found, the officers executing the warrant may not continue with their searching, and does the Fourth Amendment require that any items thereafter seized, not in plain view, be suppressed?

V

May a federal trial judge, absent a specific showing of compelling circumstances of danger to the witness or the like, foreclose inquiry concerning the present address of a key Government witness, as against this Court's holding in *Alford* v. *United States*, 282 US 687 (1931), and its progeny, and the guarantees of the Sixth Amendment to the United States Constitution?

STATEMENT OF THE CASE

In July of 1972, the defendant, Leroy Frank Collier, was charged in a three count indictment with conspiracy to import cocaine, pursuant to 21 USC 963; in the second count, he was charged with engaging in a continuing criminal enterprise relating to a conspiracy to import and possess cocaine with the intent to distribute it, under 21 USC 848; the third count charged him with violation of 21 USC

841 (a)(1), possession of cocaine with intent to distribute it.

On April 18, 1973, a jury trial commenced before the Honorable Ralph M. Freeman. The Government offered physical evidence seized from Collier's house and from other sources, and the testimony of several persons alleged to have brought cocaine into this country at Collier's behest.

The testimony of Douglas Kapp and Cathe Lucas, key government witnesses, tended to link Collier to the conspiracy to smuggle cocaine into the United States. The two came to the attention of the Government when they were searched by U. S. Customs officials who noticed bulges on their persons, and upon further search, cocaine was discovered to have been concealed in body girdles. (TT, 4-20-73. Pp 112-117.)*

At that time, the frightened Kapp and Lucas were intimidated into cooperation with the Customs authorities. Kapp was met by Agent Verklan in Detroit; and, after an unsuccessful attempt to reach Collier from a hotel room, Kapp was taken to his apartment in Plymouth, Michigan, where he successfully called Collier. (TT 4-20-73, pp. 118-120.) Customs agents recorded the ensuing telephone conversation.

The evidence was suppressed by the Court upon defendant's motion, finding that Kapp's purported consent was not given as contemplated by 18 USC 2511(2)(c).

On May 31, 1972, Customs agent Back obtained a search warrant from the Honorable Paul Komives, US Magistrate, by swearing to an affidavit and warrant prepared by agent

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* Numbers in parentheses refer to Trial (TT) and Pre-Trial Hearing (PT) Transcripts, by date and page.

Verklan and the US Attorney's secretary (PT 95-97). The affidavit for the search warrant reads, in part:

> "On May 31, 1972, at 1:45 a.m. a telephone call was placed by Kapp per his pre-arranged instruction with cocaine consignee, identified as Leroy Collier to telephone number 313-355-2199. Kapp was instructed by Collier to have Kathy Sue Lucas deliver the cocaine to his house later on this date. Collier instructed Kapp that his address was 18470 George Washington St., Southfield, Mi."

According to Kapp's testimony, the petitioner Collier, never mentioned the word "cocaine" nor gave his home address in the taped telephone conversation. (TT 4/20/73, p 121). On cross-examination, agent Verklan, who had recorded the conversation subsequently ruled to have been illegally intercepted by the court (TT 4/1/73, pp 221-22), admitted that Collier did not instruct Kapp as to his address, nor did he mention the word "cocaine", contrary to the specific information as set forth in the affidavit for the search warrant (TT 4/27/73, p 163).

The Affidavit for Search Warrant, sworn to by Agent Back on May 31, 1972, also states, "At approximately 12:00 noon, May 31, 1972, Lucas will deliver the cocaine to Collier's address in the company of Agents of US Customs." On direct examination by Mr. Hurlbert for the prosecution, Agent Back agreed that the majority of the cocaine had been taken from the package that Lucas was to deliver and lactose had been substituted for it (PT 96). Agent Back agreed that he did make a false statement in the affidavit, since the affidavit described 3,200 grams of cocaine to be delivered, but denied that he did so knowingly. He testified that he had been advised of the substitution of milk sugar after the raid. (PT 103-104).

An examination of the search warrant indicates that it is not directed to any party or class of persons for execution. The word "To" is followed by a blank space.

The Trial Court also heard arguments on the sufficiency of the search warrant. Rejecting the argument that the warrant was a legal nullity, in that it did not direct anybody to execute its demands, the court said "no one in charge of the premises asked or questioned the authority of the officer to execute the warrant" (PT 227). The Court also rejected Defendant-Appellant's argument that the affidavit in support of the search warrant states no probable cause.

The Trial Court refused to permit defense counsel to inquire as to the current addresses of those Government witnesses who claimed to have acted as couriers for Defendant-Appellant, absent a showing of particularized need, taking "judicial notice" of the dangers to witnesses in "narcotics cases" (TT 5/2/73, pp 316-321).

On May 11, 1973, the jury returned a verdict of guilty as charged to all counts against the Defendant Collier. (Defendant East, who was also being tried with Defendant Collier, was found not guilty).

In a per curiam opinion, the Sixth Circuit Court of Appeals dismissed the bulk of Petitioner's assignments of error without discussion, but specifically upheld the validity and sufficiency of the search warrant affidavit on the basis that the misstatements of fact were "reasonable interpretation", and not "erroneous", and rejected the Petitioner's attack upon the constitutionality of 21 USC §848 in one paragraph, alluding to the decision of the Second Circuit Court of Appeals in *United States* v *Manfredi*,——F2d—— (1973), as authority for the constitutionality of the Statutory provision, as applied; the Court did not specifically respond to the facial unconstitutionality issue raised by Petitioner.

REASONS FOR GRANTING THE WRIT

I

This Court has yet to determine the constitutionality of the "continuing criminal enterprise" section of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 USC §848, the vagueness of which clearly troubled the trial court (see Appendix B), and which the Sixth Circuit cavalierly disregarded in one paragraph of its per curiam opinion.

The Statute's departures from the principles of constitutionally required certainty and specificity spelled out by decisions of this Court are manifest, and call for a reasoned and final determination. The decision of the Circuit Court of Appeals is hardly responsive to this need. The Court wholly failed to address itself to the difficult question regarding the facial validity of the Statute. In a patent abdication of judicial responsibility, the Court shrugged off the question of facial sufficiency, and even declined to address itself to the difficult questions regarding the Statute's application in the case at bar.

The requirement that crime be defined with appropriate definiteness is a fundamental common law concept and an essential element of due process of law. Cases are legion that hold that the standard of certainty required in criminal statutes is more exacting than in non-criminal statutes. See, e.g., *Winters* v *New York*, 333 US 507, 92 L Ed 840, 68 S Ct 665 (1948).

In the landmark cases of *Connally* v *General Construction Co*, 269 US 385 (1926), and *Lanzetta* v *New Jersey*, 306 US 451, (1939), this Court provided exemplary guide-

lines to determine whether a criminal statute on its face is so vague and uncertain in its definition of the offense as to be repugnant to the due process clause.

The *Connally* case involved the enforcement of a criminal statute purporting, *inter alia*, to prescribe a minimum for the wages of workmen employed by contractors in the execution of contracts with the State of Oklahoma and imposing a fine or imprisonment for each day's violation. The thrust of *Connally*, which was ignored by the trial judge in the case at bar, involved the fatal lack of ascertainable standards within the statute necessary to satisfy due process. Mr. Justice Sutherland, in delivering the Opinion of the Court, emphasized that it "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law" that

> . . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning *and differ as to its application*, violates the first essential of due process of law. International Harvester Co v Kentucky, 234 US 216, 221; Collins v Kentucky, 234 US 634, 638. Connally, supra, 269 US at 391. (Emphasis supplied.) Cited in Lanzetta v New Jersey, supra, 306 US at 453.

In *Lanzetta, supra*, the Court applied the salutory *Connally* rule as to whether a penal statute is unconstitutionally vague and uncertain and overturned the New Jersey "Anti-Gangster" statute. In that case, the Court took no issue with the valid aim, purpose and objective of the legislature in rendering penal the association of criminals for the pursuit of criminal enterprises. The Court further agreed that it was the primary function of government and within the competence of the legislature to rid society of one of

the most menacing forms of evil activity. However, laudable ends cannot sanction unconstitutional means. The Court, therefore, went on to state a fundamental doctrine implicit in our constitutional system of jurisprudence:

> If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. United States v Reese, 92 US 214, 221, 23 L Ed 563, 565; Czarra v Medical Supers, 25 App DC 443, 453. *It is the statute, not the accusation under it, that prescribed the rule to govern conduct and warns against transgression.* See Stromberg v California, 283 US 359, 368, 75 L Ed 1117, 1122, 51 S Ct 532, 73 ALR 1484, Lovell v Griffin, 303 US 444, 82 L Ed 949, 58 S Ct 666. *Lanzetta, supra,* at 453 (Emphasis supplied.)

In *Giacca* v *Pennsylvania,* 382 US 399, 15 L Ed 2d 347, 86 S Ct 518 (1966), this Court strongly reasserted the absolute necessity that a statute comport on its face with the "sufficient standards" test of *Lanzetta, Connally* and their progeny. Mr. Justice Black, expressing the views of seven members of the Court, held a statute empowering a jury to assess costs against an accused whom the jury found not guilty invalid under the due process clause because of its vagueness and absence of any definite standards or conditions to govern the jury's power to impose costs. In holding that the Pennsylvania statute was unconstitutional, the Court arrived at its determination solely by viewing the statute on its face.

An examination of the legislative history of the "Continuing Criminal Enterprise" section of the Comprehensive Drug Abuse, Prevention and Control Act of 1970, 21 USC

§848, reveals that Congress was acutely aware of the statute's unconstitutional infirmity despite the effort of amendment to cure the statute's more obtrustive unconstitutional provisions.

In commenting on the original provisions of the Continuing Criminal Enterprise section and its final amended form, the congressional sentiment toward the Justice Department is recorded as follows:

> . . . there can be no doubt that the Justice Department in S. 30 and in H.R. 18583 and its precursors has shown little sensitivity either toward constitutional rights or toward modern concepts of penology and rehabilitation. Whatever bill is passed may be expected to be enforced by a department affected by those predilections reflected in its original recommendations. 1970 *US Code Congressional and Administrative News,* p 4650.

Whereas the Dingell Amendment eliminated the original bill's (S. 30) post conviction-presentencing procedure by providing "that engagement in a continuing criminal enterprise is a new and distinct offense with all its elements triable in court" the legislature candidly pointed out that the amended section, now 21 USCA 848, "still contains serious objections". 1970 *US Code Cong and Adm News,* p 4651.

To illustrate these objections, the following hypotheticals were printed in the legislative history to illustrate the still present unconstitutional vagueness in the terms "continuing series of violations" and "substantial income or resources":

> (a) It is not at all clear what constitutes a "continuing series of violations of this title or title III***."

Suppose, for instance, that six young men attending a college reside together in a cooperative boarding house. All of them have engaged in the practice of smoking marihuana cigarettes and there has been on a day or more, free exchange between them of such forbidden drug. Each incident of giving a cigarette to another constitutes a felony. How long must this practice continue in order to constitute a "continuing series of violations"? Would a single day's experiment with smoking "pot" constitute a "continuing series of violations", or would it require a week, a month, or a year of such activities to make the offenses "continuing"?

(b) It is not at all clear what is meant by deriving "substantial income or resources" from the enterprise. Let us take the situation mentioned above. Suppose one of the young men is the house manager of the boarding house. As such he is in a general "supervisory position" or "other position of management" in the ordinary affairs of the house, but he has not ordinarily obtained any "income or resources" connected with the sale of marihuana. He has only been paid for his general house management. On one occasion he purchases $100 worth of marihuana and divides it with the other five members, selling it to them at cost. Has he then obtained "substantial income or resources" in connection with the enterprise?

Or what if such common purchases by one of the group is done each week? Also, does "substantial income or resources" relate to profits or, on the other hand, to mere receipt of money? Would "income or resources" include the advantage to the house man-

> ager of obtaining his own share of the marihuana at a cheaper rate because it was bought in bulk?

The obscurity and imprecision in the statutory language of 21 USCA 848 and its lack of ascertainable standards to guide a judge or jury to properly determine whether a given accused falls within its prohibitions, simply cannot pass constitutional muster. Is a continuing series of violations to be measured on a space or time continuum? What is the minimum number of violations necessary to establish a continuing series? Where are the legally ascertainable standards necessary to establish that the accused has derived "substantial income or resources"? Does the "substantial income or resources" element vary from defendant to defendant? How should judge or jury determine this element in terms of profits, net income or gross income? Is a time factor to be employed in calculating substantial income or resources? Should the fiscal year as opposed to a monetary year be the yardstick? Can a putative defendant be said to have derived a substantial source of income or resources on two different occasions in the same day or spanned by decades in disregard of his other sources of income or resources in the given fact situation?

These questions cannot be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the legislature.

> For the vice of the statute here lies in the impossibility of ascertaining by any reasonable test, that the legislature meant one thing rather than another. *Connally, supra,* at 394.

This element of uncertainty in determining what constitutes a "continuing series of violations" and upon what spe-

cific circumstances may an accused be said to have derived "substantial income or resources" therefrom cannot be dismissed as of no consequence. The trial court itself expressed its opinion that the statute's use of the term "substantial" is not perhaps the best term available (See Appendix B, Memorandum Opinion, p 32). These are the essential elements defining a new and distinct federal offense—a serve crime which subjects the defendant who comes within its provisions and is adjudged guilty to extremely severe sanctions.

The trial court's memorandum opinion (Appendix B) itself cites the case of *United States* v *Cohen Grocery Company,* 255 US 81, 65 L Ed 516, 41 S Ct 298 (1921), where "the court held a statute unconstitutional where the Indictment merely named the price collected and charged in the exact language of the statute that defendant had charged an unjust or unreasonable rate . . . the Court found no standard which could be impliedly encompassed by the statute leaving the determination of 'unjust' and 'unreasonable' totally to the discretion of the court and jury. Under these circumstances the court held the statute unconstitutional." (Appendix B, Memorandum Opinion, p 37). Petitioner submits there are no more precise standards to determine the elements of "continuing criminal enterprise" or "substantial income or resources" as there are to determine "unjust" and "unreasonable".

The result of any application of 21 USCA 848 depends not upon any words of fixed meaning in themselves, or made definite by statutory definition, or by the context or other legitimate aid to its construction, but upon the necessarily varying impressions of judges and juries as to what constitutes the elements of "continuing criminal enterprise" and "substantial source of income or resources". The con

stitutional guarantee of due process cannot be allowed to rest upon a support so equivocal.

II.

During the course of the trial, it came to the court's attention that crucial and material facts as set forth in the affidavit for a search warrant (Appendix C) concerning the contents of the conversation between Kapp and Collier were erroneously and falsely supplied by the government agents.

Kapp was asked during direct examination by Mr. Hurlbert to tell the jury the contents of his telephone conversation of May 31, 1972, with defendant Collier. He testified that:

> I called Mr. Collier and he answered the phone. He asked me what happened and I said I got hung up and he asked me if everything was cool and I said yes. He told me, "'Well, have Casey drop the thing over tomorrow." He said, "I'll have something for her. I'm sorry you missed the show tonight. It was good, but I will see that you get good seats for the first show tomorrow." He said, "I love you" and hung up. (TT 4/20/73, p 121).

It is notable that Kapp's testimony concerning the contents of the crucial telephone conversation fails to allege that defendant instructed him to have any drugs of any kind brought to any specific location.

The testimony elicited from Agent Verklan, who had both illegally monitored the conversation and supplied the information contained within the affidavit to affiant Back, is consistent with and confirming of Kapp's testimony:

Q. My question of you was during a phone call at 1:25 a.m., May 31st, did Mr. Collier instruct Mr. Kapp what his address was?

A. No, sir, he did not.

Q. During that phone call on May 31, at 1:25 a.m., did Mr. Collier ever mention the word "cocaine"?

A. No, sir, he did not. (TT 4/27/73, p 163).

It thus became readily apparent to the court that the law enforcement agents in their zeal to implicate Petitioner with Kapp intentionally and falsely supplied their own facts and inferences concerning the conversation so that a magistrate would find probable cause to issue an *in futuro* search warrant of defendant's premises.

Purged of its erroneous statements, the affidavit was wholly lacking in facts tending to show that defendant Collier instructed Kapp to have Lucas deliver the cocaine or any contraband to any specific location, let alone his own premises at George Washington Street in Southfield, Michigan. Stripped of its incorrect assertions, the affidavit became similar to that in *Nathanson* v *United States,* 290 US 41 (1933), consisting of nothing more than the bare uncorroborated statement of affiant's belief.

The substantive information asserted to have been given by the informer to the affiant was conclusively proved at trial never to have been given at all. The law enforcement officers impermissibly chose to supply their own inferences and to draw their own conclusions by so doctoring the substance of the conversation that the magistrate would not even question the existence of probable cause to issue a search warrant of defendant's premises.

The Circuit Court of Appeals upheld the validity of the warrant simply upon the notion that the inferences which the affiant supplied as facts were "reasonable". The Court, however, with a startling lack of intellectual honesty, wholly failed to deal with the difficult question raised by the obvious fact that, however reasonable the inferences may have been, they were not presented as inferences, but were misrepresented as being facts.

What constitutes misrepresentation in the context of an affidavit for a search warrant, and what remedy should be applied when misrepresentation is shown, has been the subject of disparate judicial opinion by the Circuit Courts of Appeal. See, e.g., *United States* v *Thomas,* 489 F2d 664 (CA 5, 1973), *United States* v *Carmichael,* 489 F2d 983 (CA 7, 1973), *United States* v *Marihart,* 15 CRL 2036 (CA 8, 3/6/74). Definitive and authoritative guidelines should be supplied by this Court.

With respect to the substance of the Petitioner's position, Petitioner concedes that an affidavit need not present a mirror image of the information upon which it is based. However, the Government, as well as the Sixth Circuit Court of Appeals, misperceived the thrust of the issue when it suggested that the affidavit was sufficient so long as supported by permissible inferences, rendering the conclusion presented in the substance of the affidavit "reasonable." If the affidavit had stated that the affiant had pieced together bits and pieces of information and concluded that the "thing" to be delivered was cocaine, and that the place to which it was to be delivered was the George Washington Street address, the magistrate could have evaluated the agents' conclusions and inferences and determined if in fact they supported the finding of probable cause. However, the Court was not called upon to make such an evalu-

ation. The affidavit informed the Court that the statements contained in the affidavit had been made in the course of the intercepted communication. The statements as represented were conclusive of the question of probable cause. They made it unnecessary for the Court to evaluate the reasonableness of the affiant inferences and conclusions. To suggest that the fact that such inferences and conclusions were reasonable is in and of itself enough to support the affidavit is in effect to seek the Court's ex post facto blessings on a search already concluded. Obviously, the Fourth Amendment requires more.

III.

An examination of the subject search warrant (Appendix D) indicates that it is not directed to any party or class of persons for execution. The directive word "To" is simply followed by an empty blank space. Petitioner's position that such an omission from the search warrant renders it invalid on its face presents a question of some importance to the federal criminal jurisprudence.

The applicable rule in effect at the time of the search was FR Crim P 41(c), which provided as follows:

> "A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. *The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the*

> *President of the United States.* It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. If shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned. (Emphasis supplied.)

On April 24, 1972, the rule was amended (the effective date being October 1, 1972), to read as follows:

> A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the

> United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

Deleted from Rule 41(c) was the requirement that the warrant itself state the grounds for its issuance and the names of the affiiants. Remaining intact, of course, was the command that the person or class of persons authorized to serve it shall be stated in the warrant itself. Certainly this indicates an intention not to abandon the requirement that such direction be made a part of the warrant; otherwise that portion of the rule could well have been eliminated as unnecessary paper work.

The caption and direction in a search warrant has been construed as an essentianl part of that warrant, the omission of which makes the warrant fundementally defective. *Leonard* v *United States,* 6 F2d 353, 355 (1 Cir 1925); *United States* v *Smith,* 16 F2d 788 (SD Fla 1927).

The Court of Appeals failed to deal directly with the question presented herein, despite its obvious importance to federal criminal jurisprudence. This Court should grant certiorari, Petitioner submits, and render final and authoritative decision with respect to the effect of the clear language of FR Crim P 41(c).

IV.

The facts are uncontroverted that the only article described in the affidavit supporting the search warrant (Ap-

pendix D) was the 3,200 grams of cocaine to be delivered to Defendant's premises. Prior to the forcible entry, agents Verklan, Back and Liming were informed by the couriers that the delivered cocaine had been placed in the office section of the home (PT 105). The sixteen law enforcement officers secured the safety of the premises within a few minutes after their entry and gathered all the occupants into the living room (PT 25, 74).

At or about the same time, Special Agent Jesse Back entered the office, approached the cabinet, opened the right door, and exuberantly shouted out that he had found the delivered cocaine (PT 105). Agent Verklan performed a field test to confirm that the brown bag contained cocaine. Agent Nilsen then proceeded to take several pictures of the contraband (PT 115-117).

Notwithstanding the fact that the sought-after article had been found and the premises had been safety secured, the law enforcement officials contained to search and comb the premises for up to two hours in the hopes of finding any kind of additional incriminating evidence. The subsequent search probed into numerous drawers, dressers and file cabinets (PT 35 *et. seq.*). Agent Back continued to search the office (PT 99). Upon opening the other cabinet drawer, he found a closed attache case, raised its lid and found an additional amount of cocaine (PT 100). In the master bedroom, Agent Best found a small quantity of contraband in a night stand drawer (PT 146). Hundreds of additional items, ranging from passports, blank calendar pads, pictures, letters, sales receipts, watches, jewelry, piggy banks and currency were seized and brought into the living room (PT 35-46, 145).

An evidentiary hearing was conducted on March 23, 1973, and evidence was heard with respect to a motion to

suppress. Counsel for the defense stated that the purpose of the hearing was to show facts that outside of the one item mentioned in the search warrant, hundreds of items were taken, not incidental to a lawful arrest, not mentioned in the search warrant, and not within the plain view of the officers. Later, on April 13, 1973, the court held that much of the seized items would be suppressed from evidence, although the narcotics, the scales, and the spoons would be admitted into evidence as instrumentalities. (Appendix E).

This decision, affirmed without discussion in the Court of Appeals, ignores the mandate of *Marron* v *United States,* 275 US 192, 195-196, 72 L Ed 231, 236, 237, 48 S Ct 74 (1927), in which this Court held that a search continuing past the scope of a valid warrant is precisely the type of general search that is proscribed by the Fourth Amendment.

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. *As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.* 275 US at 195-96. (Emphasis supplied.)

Petitioner is mindful that courts have carved out a number of exceptions to the strong language of *Marron.* Certain undescribed items may be seized pursuant to a search warrant where those items come to the executing officers' attention *during* the proper execution of the warrant, and where said items bear a reasonable relationship to the purpose of the search, *United States* v *Cook,* 432 F2d 1093 (1970); *Mesmer* v *United States,* 405 F2d 316 (1969).

The continuing scope and validity of *Marron, supra,* is a matter regarding which direction from this Court is essential. While the principle expressed in *Marron* has been recently underscored by the Court in *Stanley* v *Georgia,* 394 US 557 (1969), the question of the proper scope of searches incident to warrants continues, and, Petitioner submits, represents an area of federal criminal jurisprudence and Fourth Amendment Law which is in need of explication by the Court.

Moreover, the case at bar presents a peculiar problem regarding the proper scope of the warrant itself. While both the affidavit and the search warrant itself (Appendices C and D) referred to "cocaine and other narcotic drugs and the means and instruments for acquiring, possessing and dispensing same," no facts set forth in the affidavit are presented with respect to anything except the cocaine which was the subject of the controlled delivery. The position of Petitioner is that mechanistic and ritualistic phrases such as "means and instrumentalities" cannot be used to defeat the plain meaning of the Fourth Amendment, and that notwithstanding the language of the warrant, no search for anything save the described cocaine was justified or proper under the facts as presented to the magistrate.

V.

The trial court in the case at bar refused to permit counsel for Petitioner to inquire as to the current addresses of the key Government witnesses (See Appendix F). These rulings are a clear departure from well-established precedent and rulings of this Court.

The Court's ruling denying Petitioner's right to inquire into the present address of Government informer Douglas Kapp on the basis that such inquiry is irrelevant, is patent-

ly erroneous. The right to cross-examine a witness as to his present address has long been affirmed by this Court and inferior federal courts as a necessary adjunct to an effective implementation of the Sixth Amendment right of confrontation. *Alford* v *United States,* 282 US 687 (1931); *Smith* v *Illinois,* 390 US 129, (1968); see *United States* v *Mills,* 366 F2d 512 (6th Cir 1966); *United States* v *Lyon,* 397 F2d 505, 511 (7th Cir 1968); *United States* v *Marchesani,* 457 F2d 1291, 1297 (6th Cir 1972).

Forty years ago, this Court held in *Alford, supra,* that it is error to require a showing of materiality, as the trial judge did here, since a question as to address may be used as a basis for further inquiry. Referring to *Alford, supra,* the Court in *United States* v *Lyon, supra* at 511 stated: "The purpose of the inquiry is to make known to the jury the setting in which to judge the character veracity or bias of the witness." In *Alford, supra,* the Court, in recognizing the manifest relevancy of inquiry into a witness' address, stated:

> Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. 282 US at 692.

The trial judge further sustained the Government's objection to the inquiry of witnesses Christian and Helton's present addresses on a two-pronged rationale: (1) failure of defense counsel to "tell the Court some good reason why you need to know these addresses, and (2) the court's taking "judicial notice of the fact that a narcotics case involving narcotics of the amount involved in this case are

dangerous cases and these pose danger to any witness testifying against the defendant . . .", (TT 5/2/73, p 320). Petitioner submits that both prongs supporting the court's ruling are erroneous as a matter of law, and directly ignore this Court's clear and unequivocal pronouncements.

The salutory opinion of this Court in *Smith, supra,* bearing directly on the issue raised by Petitioner, merits considerable attention. In *Smith,* as in the case at bar, the principal witness against the Petitioner, in a conviction based upon the illegal sale of narcotics, was a government informer. The Court reversed that petitioners conviction because of the trial court's sustaining the prosecutor's objection to defense counsel's cross-examination of the witness' real name and actual present address. The Court in so ruling, noted:

> In *Pointer* v *State of Texas,* 380 US 400, 403, 85 S Ct 1065, 1068, 13 L Ed 2d, 923, this Court held that the Sixth Amendment right of an accused to confront the witnesses against him is a "fundamental right . . ."
>
> As the Court said in *Pointer,* "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him" 380 US at 404, 85 S Ct at 1068. Even more recently we have repeated that "[a] denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart* v *Janis,* 384 US 1, 3, 86 S Ct 1245, 1246, 16 L Ed 2d 314.
>
> In the present case there was not, to be sure, a complete denial of all right of cross-examination.

But the petitioner was denied the right to ask the principal prosecution witness either his name *or where he lived,* although the witness admitted that the name he had first given was false. Yet when the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the truth" through cross-examination must necessarily be to ask the witness who he is and *where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.*

In *Alford* v *United States,* 282 US 687, this Court almost 40 years ago unanimously reversed a federal conviction because the trial judge had sustained objections to questions by the defense seeking to elicit the "place of residence" of a prosecution witness over the instance of defense counsel that "the jury was entitled to know 'who the witness, is where he lives and what his business is'" 282 US at 688-689, 51 S Ct at 218. What the Court said in reversing that conviction is fully applicable here:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, *even though he is unable to state to the court what facts a reasonable cross-examination might develop.* Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of proceeding . . ." 380 US at 407-408, 85 S Ct at 1070. In this state case we follow the standard of *Alford* and hold that the petitioner was deprived of a right guaranteed to him under

> the Sixth and Fourteenth Amendments of the Constitution. (Emphasis supplied.) *Smith, supra,* 390 US 129, 131-133.

Succinctly stated, the record in the instant case shows the impropriety of the Court's "judicial notice" that cases involving large amounts of narcotics pose danger to the safety of witnesses testifying against the defendant. Neither the Government nor Court was able to show any evidence beyond a speculative and unsubstantiated contention that the witnesses' personal safety might possibly be endangered. The net effect of the Court's ruling restricting the latitude of Petitioner's cross examination thus violated his right of confrontation as guaranteed to him under the Sixth Amendment, and represents a clear departure from well-considered and established decisions of this Court.

CONCLUSION

It is therefore respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FREDERICK R. BELLAMY
NEIL H. FINK

APPENDIX A

NO. 73-1796

United States Court of Appeals
FOR THE SIXTH CIRCUIT

United States of America, Plaintiff-Appellee, v Leroy Frank Collier, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed March 27, 1974.

Before: Weick and Lively, Circuit Judges, and Rosenstein, Senior Customs Judge.*

Per Curiam. Appellant Collier was convicted after jury trial on the following counts: Count I, conspiracy to import cocaine in violation of 21 USC §963; Count II, engaging in a continuing criminal enterprise relating to a conspiracy to import and possess cocaine in violation of 21 USC §848; Count III, possession of cocaine with intent to distribute in violation of 21 USC §841(a)(1). Of the numerous issues raised on this appeal, only the two challenging the constitutionality of 21 USC §848 and the sufficiency of the affidavit underlying the search warrant involved herein merit extended discussion. We affirm.

* Senior Judge Samuel M. Rosenstein, United States Customs Court, sitting by designation.

The facts are substantially as follows: In May, 1972, Douglas R. Kapp and Kathy Lucas, a/k/a Casey Lucas, were arrested at Miami International Airport, Miami, Florida, as they attempted to pass through customs when it was discovered that they were transporting six pounds of unadulterated cocaine. Shortly thereafter, complying with a request to cooperate, they informed customs officials that they had been hired by Collier to pick up the cocaine in South America and transport it to Detroit, Michigan, where they were to contact him at his home for delivery instructions.

Based on this information, customs officials decided to conduct a controlled delivery of the cocaine. Accordingly, Kapp and Lucas were flown to Detroit where Kapp made the pre-arranged telephone contact with Collier concerning the delivery of the cocaine. The ensuing exchange occurred during this conversation:

> Kapp: I got hung up down there a little.
> Collier: But you're cool?
> Kapp: Yeh.
> Collier: Okay beautiful. Tomorrow send Casey by with that and I'll send her back, send something back for you with her.

Thereafter, customs agent Back, in quest of a warrant for the search of Collier's home, submitted an affidavit which included the following statement:

> "On May 31, 1972, at 1:25 a.m., a telephone call was placed by Kapp per his pre-arranged instruction with cocaine consignee, identified as Leroy Collier to telephone number (313) 355-2199. Kapp was instructed by Collier to have Kathy Sue Lucas deliver the cocaine to his house later on this date. Collier instructed Kapp that his address was 18470 George Washington St., Southfield, Michigan.

> At approximately 12:00 noon, May 31, 1972, Lucas will deliver the cocaine to Collier's address in the company of Agents of US Customs."

On the basis of the affidavit, a Magistrate issued a warrant authorizing the search of Collier's home for the specified cocaine and any means and instrumentalities used for possessing or dispensing of such. Thereafter, agents permitted Lucas to deliver the cocaine to Collier at his home. After she departed, they entered the premises, conducted a thorough search and seized evidence including the controlled delivered cocaine.

Appellant claims that the statements contained in the affidavit to the effect that he told Kapp to have Lucas deliver "cocaine" to his house and also advised him of his address were totally erroneous. Inasmuch as this recital "struck at the heart of probable cause" and was the primary basis for the issuance of the search warrant, Collier alleges that the lower court erred in overruling his motion to suppress all the evidence seized during the search of his home.

While it is undisputed that Collier did not specifically utter the word "cocaine" or announce his address during the telephone conversation with Kapp, judging from the events leading up to that conversation, we do not feel that these references were erroneous. Rather, they appear to be the only reasonable interpretation of what was said. Admittedly, agent Back could have been more precise; however, when considering the sufficiency of an affidavit, the following guidelines must be applied:

> "The Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one in-

> volved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." United States v Ventresca, 380 US 102, 108 (1965); United States v Harris, 403 US 573, 577 (1970).

In light of the above, we conclude that the affidavit was sufficient to establish probable cause for issuance of the search warrant.

With regard to the issue challenging the constitutionality of 21 USC §848, appellant maintains that this provision is vague on its face, thus depriving him of liberty and property without due process of law. We disagree with this assertion and concur in the recent Second Circuit case of *United States* v *Manfredi*, —— F2d —— (1973), in which it was stated:

> ". . . the statute might have been more artfully drawn, but no language has occurred or has been suggested to us that better expresses the congressional purpose. To sustain appellant LaCosa's position would force us to hold that words cannot be devised to make it an offense to engage in the continuous sale and trafficking in heroin with a number of other people and with substantial sums of money changing hands; we feel that not to be the case and

that, as applied to the conduct with which Joseph LaCosa was charged, Broadrick v Oklahoma, —— US —— (1973), is not unconstitutionally vague."

All other issues tendered in appellant's brief do not warrant discussion.

Affirmed.

APPENDIX B

MEMORANDUM OPINION

(US District Court—Eastern District of Michigan Southern Division)

(Filed .....)

Defendant Leroy Frank Collier seeks in this motion to quash Count II of the Indictment which charges defendant with violating 21 USC §848, the Continuing Criminal Enterprise Section of the Comprehensive Drug Abuse, Prevention and Control Act. Under §848 it is unlawful for any person to engage in a continuing criminal enterprise. Subsection (b) of this statute defines continuing criminal enterprise as follows:

"A person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a *continuing series* of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains *substantial income* or resources. (Emphasis added.)

Defendant claims that the terms "continuing series" and "substantial income" italicized above are so vague that they fail to warn an individual of the criminal consequences of this conduct and thus deprive him of due process of law. Count II of the Indictment incorporates Counts I and III of the Indictment and charges in the language of the statute that the violations listed in Counts I and III are a part of "a continuing series of violations of subchapters I and II . . ." In addition Count II charges that defendant obtained substantial income from said continuing series of violations.

Count I charges defendant with violating 21 USC §693. That section provides

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Allegedly the defendants in this case conspired to violate sections 952(a) and 960 which provide that it is illegal to import controlled substances into the customs territory of the United States or into the United States.

Count III alleges that defendant Leroy Collier, on or about May 31, 1972, did knowingly and intentionally un-

lawfully possess with intent to distribute approximately eight kilograms of cocaine in violation of §§841(a) and 841 (b)(1)(A).

The parties disagree as to the parameters of this Court's examination of the statute. Defendant contends that the Court must view the statute on its face, while the Government maintains that we must view the statute in light of evidence presented on the Government's case. In other words the Government views the motion as being premature. We do not agree with either of the positions presented for the reasons set forth below.

As discussed in the briefs submitted by the parties, a criminal statute must adequately warn an individual of the criminal consequences of his conduct. *Jordan* v *DeGeorge,* 341 US 223 (1951). However, not every ambiguity in a statute renders it unconstitutional. Thus the mere fact that the exact parameters of the statute are unclear does not prevent proper application of the statute to conduct clearly within the bounds of the statute. Thus, in *United States* v *National Dairy Products Corp,* 372 US 29, 32 (1963) the Court said:

> The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language . . . In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.

In that case the defendants were charged with violating §3 of the Robinson-Patman Act which prohibits sale of goods at "unreasonably low prices" for the purpose of

destroying competition. The indictment charged the defendants specifically with selling "below cost". The court said that in light of the principles set forth heretofore if §3 gave defendants "sufficient warning that selling *below cost* for the purpose of destroying competition is unlawful, the statute is constitutional as applied to them." (Emphasis added.) Thus a statute is not always viewed on its face alone. See also *US* v *Raines,* 362 US 17, 22 (1960).

In *US* v *Raines, supra,* at p 22, the court reached this same conclusion, stating that a defendant is limited to his own situation in determining constitutionality. The court went on to list, however, the exceptions to that rule as follows:

a) Where the rights of others not before the court would be impaired and where there is no way to preserve these rights;

b) Where the statute inhibits free speech;

c) Where a statute has been declared unconstitutional as to so many situations that it is no longer vital.

None of these situations covers the case at bar. See also *Daulton* v *US,* (6th Cir 72-1891, Mar. 1, 1973).

Thus it is true as defendant points out that in many cases the Supreme Court has viewed statutes on their face. But the cases cited by defendant involved statutes that fell within the exceptions listed in *Raines, supra. Thornhill* v *Alabama,* 310 US 88 (1940); *Coates* v *City of Cincinnati,* 402 US 611 (1971); *Dombrowski* v *Pfister,* 380 US 479 (1965); *NAACP* v *Button* 371 US 415 (1963), and *Lanzetta* v *New Jersey,* 306 US 451 (1939), cases cited by defendant, were all cases in which the statutes were alleged to infringe on the First Amendment rights of individuals. *Connally* v *General Construction*

Co, 269 US 385 (1926), another case relied upon by defendant clearly discussed the facts underlying the declaratory judgment action. The statute was viewed in light of the fact situation before the Court. It is true that in *Giaccio* v *Pennsylvania,* 382 US 399 (1966), the court viewed a statute on its face which did not involve First Amendment problems. But the statute in question involved the right of the jury on a misdemeanor trial to assess costs against an acquitted defendant. There was no conduct to review. The evidence presented at trial had no bearing on the statute. The only manner in which the statute could ever be reviewed was on its face.

Thus, the court in *National Dairy, supra,* stated where First Amendment rights are not involved and where the statute is directly only at

> "activity which is neither constitutionally protected nor socially desirable, we are thus permitted to consider the warning provided by §3 not only in terms of the statute 'on its face' but also in the light of the conduct to which it is applied."

See also *Coates* v *City of Cincinnati, supra,* at p 618 (dissent of J. White) and *Boyce Motor Lines* v *United States,* 342 US 337, 343 (1952).

Under these circumstances this Court finds that it may look at the conduct charged in the Indictment and determine whether the language of the statute advised the defendant that this particular conduct violated the statute. We note, however, that we find no authority to look beyond the Indictment to facts which may be proved at trial. The cases we have reviewed talk in terms of conduct charged and not conduct which may be proved on the trial of the case.

In the case of *Boyce Motor Lines, Inc* v *US,* 342 US 337 (1952) the defendant tried to introduce certain facts not contained in the Indictment in its motion to dismiss the Indictment because of the unconstitutionality of the statute in question. The Supreme Court said at page 343,

> But that is plainly a matter for proof at the trial. We are not so conversant with all the routes in that area that we may, with no facts in the record before us, assume the allegations of the indictment to be false.

In a footnote to this section the court stated

> This case is here to review the granting of a motion to dismiss the indictment. It should not be necessary to mention the familiar rule that, at this stage of the case, the allegations of the indictment must be taken as true.

This case seems to make clear that only the Indictment may be viewed by the court in determining the conduct allegedly in violation of the statute. Under these circumstances the statements in the Government's brief of facts that will be shown at trial or which appear in depositions are not properly before the court at this time on this motion.

However, where the Indictment merely sets forth the charge in the language of the statute the statute can only be viewed on its face. In *US* v *Cohen Grocery Company,* 255 US 81 (1921), a case distinguished, but not overruled in *National Dairy Products, supra,* the court held a statute unconstitutional where the Indictment merely named the price collected and charged in the exact language of the statute that defendant had charged an "un-

just or unreasonable rate." The court held that no specific or definite act was proscribed by the statute or alleged in the Indictment. Moreover, the court found no standard which could be impliedly encompassed by the statute leaving the determination of the meaning of "unjust" and "unreasonable" totally to the discretion of the court and the jury. Under these circumstances, the court held the statute unconstitutional.

The first phrase that troubles defendant is "continuing series of violations." As to the word "continuing" the court is concerned with the time period encompassed by this term. Webster's New World Dictionary (2d Ed 1972) defines continuing as "to remain in existence or in effect; last; endure." In *US* v *Midstate Horticultural Co,* 306 US 161 (1939) the court in determining a question of venue was required to determine whether the crime was a "continuing offense". The court defined continuing offense as a "continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy." See, also, *State* v *O C Johnson,* 212 NC 566 (1937) at p 570; Black's Law Dictionary (4th Ed 1951) *"Continuing".* Enduring; not terminated by a single act or fact; subsisting for a definite period or intended to cover or apply to successive similar obligations or occurrences." Thus the term "continuing" on its face seems to have acquired a reasonably clear meaning through judicial interpretation.

The term "series" is defined often as meaning three or more related events. See Webster's Third New International Dictionary, 1966. In *Tarsia* v *Nick's Laundry & Linen Supply Co,* 239 Or 562 (1965), the court read a civil statute prohibiting a "series of acts" to mean three or more "things or events standing or succeeding in order

and having like relationships to each other." In *Tarsia* the court reversed the judgment against defendant because only two, not three related and prohibited acts had been proven.

The word "series" would seem in light of dictionary definitions and *Tarsia* to mean three or more related acts and thus we find that term alone is not vague even on its face.

We note that only two specific violations of the chapters in question have been alleged in the Indictment. However, we view this as a matter of proof on the trial of this case. The Indictment does not state that "these two alleged violations constitute a continuing series of violations", but only alleges that they are part of a "continuing series of violations." Moreover, certain of the overt acts set forth in Count I of the Indictment, namely, paragraphs 3 and 13, constitute violations of other sections of the Act. Within Counts I and II of the Indictment at least three violations of the Act appear. Thus, this Court finds that this conduct clearly falls within the term "continuing series of violations" even if the exact parameters of the statute were found to be unclear. In addition, we find that on its face the term "continuing series" is not so vague that a person is not sufficiently warned of the consequences of his conduct nor is it so vague that the judge and jury will be unable to apply that term to defendant's conduct.

The term "substantial income" also gives the defendant trouble. Since the Indictment charges defendant in the language of the statute, naming no dollar figure or other figure of value, we are left with only the face of the statute in determining its scope and validity. Substantial is defined by Black's Law Dictionary, *supra,* as meaning "of real worth and importance; of considerable value; valuable."

The Government has cited two cases involving tax statutes in which courts refused to hold the term "substantial income" void for vagueness. See *Levenon* v *US,* 157 F Supp 244 (ND Ala 1957) and *Safe Deposit & Trust Company of Baltimore* v *Magruder,* 34 F Supp 199 (D Md 1940). The term substantial has appeared in many other legal settings. Thus in the area of patent law the court is asked to determine whether the accused device is "substantially equivalent" to the protected device. Under the long arm statutes of Massachusetts and Ohio the courts have jurisdiction over entities that derive "substantial revenue from goods" sold in the state. See *Stewart* v *Bus and Car Co,* 293 F Supp 577 (ND Ohio, 1968) and *Mark* v *Obear & Sons, Inc,* 313 F Supp 373 D Mass 1970).

Likewise, in the case of *Joseph E Seagram and Sons, Inc* v *Hostetter,* 384 US 35 (1966), the court upheld the use of the term "principal or substantial business" in a state liquor control statute. The court said at pages 48 and 49

> The claim of vagueness is centered upon the term "principal or substantial." We cannot agree that that language is so vague as to be constitutionally invalid.

Although this Court has been greatly troubled by the language of this statute, we note the remarks of the Supreme Court in *Jordan* v *DeGeorge, supra,* when they were reviewing the term "moral turpitude". The court said in *Jordan* that the term had been used frequently over the years in statutes and had never been held constitutionally vague. These circumstances, the court said, cast doubt upon a challenge to the precision of the term. Thus, although the term "substantial" is not perhaps the best term available, this Court finds that it is sufficiently precise to pass constitutional muster.

This Court has given the statute, and in particular, the language challenged, careful consideration. We note that in section 849 which follows the section (848) in question, the term "substantial *source* of income", as essential element of a violation of that section, is specifically defined in subsection (e) for purposes of section 849 alone. Certainly the specificity of that definition is preferred over the language of §848. But we are mindful of the statements of the Supreme Court in the first case in which the court held unconstitutional a statute promulgated by Congress. Thus in *Marbury* v *Madison,* 1 Cranch 137, 177-180 the court said that this power to determine the constitutionality of statutes is "the gravest and most delicate duty that this Court is called on to perform." Moreover, a strong presumption of validity attaches to statutes passed by Congress.

In *Boyce Motor Line* v *United States, supra,* at page 340, the court said:

> A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.

With these principles in mind we therefore hold that the statute in question is not unconstitionally vague in that it does not deny defendant due process by being insufficient to warn him of the conduct that falls within the purview of the statute.

In addition defendant challenges §848 on the ground that the sentencing provision is unconstitutional in that it vests "arbitrary discretion in the sentencing judge" in violation of the equal protection clause. Defendant also claims that the penalty imposed constitutes cruel and unusual punishment. We find these arguments to be without merit.

The statute is held to be constitutional and the motion to dismiss Count II of the Indictment is therefore denied.

/s/ Ralph M. Freeman
United States District Judge

Dated: April 26, 1973.

To: Robert P. Hurlbert
Assistant United States Attorney
809 Federal Building
Detroit, Michigan 48226

Neil H. Fink
3300 Guardian Building
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S. Allen Early, Jr.
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Detroit, Michigan 48226

APPENDIX C

AFFIDAVIT FOR SEARCH WARRANT

(US District Court—Eastern District of Michigan—Southern Division)

(Filed .....)

United States of America

v

18470 George Washington St., Southfield, Mi; 2nd house west of the intersection of George Washington St. and Continental Ave., located on North side of street. 1 story, stucco-brick front, attached 2 car garage on west side of house. Circle drive in front, fully enclosed swimming pool in rear. Spanish-type arches on front of dwelling. Yellowish-brown in color.

Before Hon. Paul J. Komives, Federal Bldg., Detroit, Michigan 48226.

The undersigned being duly sworn deposes and says:

That he is positive[1] that on the premises known as 18470 George Washington Street, Southfield, Mi; 2nd house west of the intersection of George Washington St. and Continental Ave., located on north side of street. 1 story, stucco-brick front, attached 2 car garage on west

[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

side of house. Circle drive in front, fully enclosed swimming pool in rear. Spanish type arches on front of dwelling. Yellowish-brown in color, in the Eastern District of Michigan, there is now being concealed certain property, namely cocaine and other narcotic drugs and the means and instruments for acquiring, possessing and dispensing same which are possessed contrary to Section 841(a)(1), Title 21, United States Code.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

On May 30, 1972, at 6:25 p.m. at Miami International Airport, Miami, Fla., at the US Customs Inspection Area, arriving from Cali, Columbia, South America, Braniff International Airlines Flight 906, a secondary search of passenger Douglas Reinaldo Kapp revealed 1550 grams of unadulterated cocaine concealed in a woman's girdle which he was wearing. A second search of a fellow passenger, Kathy Sue Lucas, revealed 1650 grams of unadulterated cocaine concealed in a girdle she was wearing. A field test conducted by US Customs officers revealed a positive reaction for cocaine. Both subjects were arrested, advised of certain constitutional rights, and agreed to cooperate with Customs officials and flew to Detroit on May 30, accompanied by Special Agents of the US Bureau of Customs.

On May 31, 1972, at 1:25 a.m., a telephone call was placed by Kapp per his pre-arranged instruction with cocaine consignee, identified as Leroy Collier to telephone number (313) 355-2199. Kapp was instructed by Collier to have Kathy Sue Lucas deliver the cocaine to his house later on this date. Collier instructed Kapp that his address was 18470 George Washington St., Southfield, Mich.

At approximately 12:00 noon, May 31, 1972, Lucas will deliver the cocaine to Collier's address in the company of Agents of US Customs.

Jesse M. Back
Special Agent,
US Bureau of Customs

Sworn to before me, and subscribed in my presence, May 31, 1972.

Motion Exhibit III

APPENDIX D

SEARCH WARRANT

(U. S. District Court—Eastern District of Michigan—Southern Division)

(Filed .....)

United States of America

vs.

18470 George Washington Street, Southfield, Mi; 2nd house west of the intersection of George Washington St. and Continental Ave., located on north side of street. 1 story, stucco-brick front, attached 2 car garage on west side of house. Circle Drive in front. Fully enclosed swim-

[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

ming pool in rear. Spanish type arches on front of dwelling. Yellowish-brown in color.

Affidavit having been made before me by Special Agent Jesse M. Back, Bureau of Customs, that he is positive[1] that on the premises known as 18740 George Washington Street, Southfield, Mi; 2nd house west of the intersection of George Washington St. and Continental Ave., located on north side of street. 1 story, stucco-brick front, attached 2 car garage on west side of house. Circle drive in front, fully-enclosed swimming pool in rear. Spanish type arches on front of dwelling. Yellowish-brown in color, in the Eastern District of Michigan, there is now being concealed certain property, namely cocaine and other narcotic drugs and the means and instruments for acquiring, possessing and dispensing same which are possessed contrary to Section 841(a)(1), Title 21. United States Code, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search at any time in the day or night[1] and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 31st day of May, 1972.

Paul J. Komives,
U. S. Magistrate.

COMPLAINT

(U. S. District Court—Eastern District of Michigan—Southern Division)

(Filed.....)

Before Hon. Paul J. Komives, U. S. Magistrate, in the Federal Building, Detroit, Michigan:

The undersigned complainant being duly sworn, states:

That on or about May 31, 1972, at.....in the Eastern District of Michigan, Southern Division, Leroy Frank Collier and Lizzie Mae Collier, knowingly and intentionally did unlawfully possess with intent to distribute approximately 15 pounds of cocaine, a Schedule I, narcotic drug substance; in violation of Title 21 U.S.C. §841(a)(1).

And the complainant states that this complaint is based on the fact that the defendants were found in possession of the aforedescribed cocaine by Special Agents of the Bureau of Customs and the Bureau of Narcotics and Dangerous Drugs in the course of executing a search warrant at 18740 George Washington Street, Southfield, Mi, the residence of the defendants.

And the complainant further states that he believes that the Special Agent Jesse M. Back, Bureau of Customs and Special Agent Thomas Kostecke, Bureau of Narcotics and Dangerous Drugs and the complainant are material witnesses in relation to this charge.

Signature of Complainant

John Verklan, *Special Agent*
Official Title
Bureau of Customs

Sworn to before me, and subscribed in my presence, May 31, 1972.

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APPENDIX E

ORDER DENYING IN PART DEFENDANT'S MOTION TO SUPPRESS ALL EVIDENCE

(237) Detroit, Michigan
Friday, April 13, 1973
9:15 o'clock, A.M.

The Clerk: No. 47977. United States of America v Leroy Frank Collier, and others.

The Court: Two days ago on April 11, I ruled on certain matters or aspects of some of the motions filed in this case and stated, as I recall it, the posture of those motions and at the conclusion of the arguments on that date I took under advisement the motion to dismiss Count Two and also the issue presented by the motion to suppress as to whether mere evidence could be seized under the warrant. I will now dispose of those two matters.

I deny the motion to dismiss Count Two, although I must say I am troubled by that matter and I think I have said enough already to indicate that I was troubled by it. I will issue a memorandum opinion in a few days setting forth my reasons.

In disposing of the motion at this time I think it's obvious that I reject the Government's contention that the Court should, that the motion is premature, that the Court should await the evidence in ruling on the motion. It was the position of the defendants that the Court, under the

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(238) The Court:

The remaining issue that I must decide before the case goes to trial is whether or not under the search warrant the officers were entitled to seize more evidence as distinguished from instrumentalities as fruits of the crime.

As I read *Warden* v *Hayden*, which was by the way a warrantless search, I believe that was the first instance where the Supreme Court recognized the equivalency of evidence with means and instrumentalities and authorized the seizure of mere evidence. The Government relied to some extent in the argument and in the supplemental brief on the Sixth Circuit case of *US* v *Alloway*, 397 F 2d 105; the *Munroe* case, a Fifth Circuit case, 421 F 2d 644, as well as *US* v *Robinson*, a (239) Fed Supp case in the Northern District of Indiana and also *US* v *Blank*, a Sixth Circuit case cited in 1972. The *Alloway* case probably comes as close as any of these cases to allowing the seizure of evidence, but as I remember it in the *Alloway* case, a certain warrant authorized a search for a weapon and case, is that it? I have forgotten it. I think it was, but in any event some clothing was found in the search and then it came a question of whether or not the clothing was mere evidence and in that case, as I recall it, the defendant's wife admitted the officers to the premises and also permitted them to take away the clothing.

Although the clothing did seem to be evidence and it would certainly be evidence but then the question arose whether or not it would be something more than evidence, it would be an instrumentality and the court did say in that case on page 11 of the opinion in discussing this very point:

> "It is not at all unreasonable to consider that the Bond suit was part of the felon's planned parapher-

nalia and, therefore, was an instrumentality of the criminal enterprise."

I don't find any case from our own research and I don't agree the Government has submitted any case that squarely holds that a warrantless search for contraband and instrumentalities impliedly authorize the right to search (240) for evidence.

True enough, under the *Hayden* case they did permit the seizure of evidence but that was a warrantless search and a hot pursuit matter. I believe that under the authority of that case had the officers requested of a magistrate the right to search for evidence as well as the fruits and instrumentalities of the crime and the contraband the magistrate would have been permitted under *Hayden* to have authorized such a search but they didn't ask; the affidavit didn't request it and the warrant issued by the magistrate didn't authorize it.

So I am unable to find any authority that squarely holds that the warrant authorizing a search for contraband and instrumentalities of crime, unless it specifically authorizes the search for evidence, does not impliedly grant that right, therefore, I then hold that the items which would fall within the category of mere evidence are improperly seized and the motion is granted as to those items.

You gentlemen will have to pick them out. There are about eight or ten pages. I have held the contraband, the narcotics is properly seized, the scales, the spoons and that sort of thing which would be instrumentalities. I think I already ruled the passport was properly seized.

There may be some instrumentalities I have (241) forgotten, but they are rather limited I think in number and

I already held that there are other large numbers of items consisting of jewelry and cameras and items of that kind are not properly seized.

One of the officers testified that one of the purposes in executing a warrant of that kind was to look through the premises for stolen goods and goods improperly imported and matters of that kind. I don't see that under a warrant of this kind. Of course, anything discovered in plain view which would be proper—there were very few things in plain view. I think the scales are the only thing in plain view as I remember it in this case. You can't call something in plain view when you are going through the drawers and cabinets and all of the private places in a person's home.

There were some guns found in connection with the securing of the premises and I held those were properly seized.

I believe you gentlemen can probably agree on what items constitute mere evidence such as for instance the deed to the house and I think the utility bills and I think perhaps the stubs, the last copy of the plane tickets and matters of that kind.

Mr. Fink: All of the photographs, numerous (242) photographs were seized from the home.

The Court: Yes, I believe photographs would be evidence. If you can't agree I will try and settle that either during or immediately before the trial.

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APPENDIX F

(316) RULING OF THE COURT ON WHETHER TO PERMIT INQUIRY AS TO WITNESSES ADDRESSES

Mr. Fink:

At the conclusion of Douglas Kapp's direct testimony, Counsel (317) advised the Court that he intended on cross examination to ask Douglas Kapp's present address but made the Court aware of his intention because the Government asked that we do so in camera because the Government objected.

The Court ruled that his address wasn't relevant. Subsequently I have had other discussions with Mr. Hurlbert about the other lay witnesses and he said he would pose the same objection for the same reasons, the safety of the witnesses. We have assumed your Honor's ruling would be the same and haven't attempted—

The Court: You shouldn't assume that.

Mr. Fink: We didn't want to do it in front of the Jury.

The Court: You don't have to. You can do it out of the presence of the Jury. I haven't denied you that right during this trial.

Mr. Fink: As to Douglas and Casey Kapp we are protected and as to Brenda Jane Helton we are not protected because we thought we would bring it up at a later time feeling sure the Court would rule the same way.

The Court: You shouldn't assume that at all.

Mr. Fink: Very well, because that was never discussed I would like to ask Miss Christian her present address and recall Brenda Helton and see where I go from there.

(318) The Court: For what purpose?

Mr. Fink: I can't give you a reason in the first instance. As I said about the Kapps, I don't think a cross examiner has to be bound by any specific reason. I think it is important to put them in their proper setting and present setting and if you cut me off on a mundane question like that I think effectively denies me my right of confrontation.

The Court: First, I will ask the Government if they have any objection.

Mr. Hurlbert: We have no objection to bringing out the city where these people reside.

The Court: I am talking about these other witnesses, Christian and the Helton woman.

Mr. Hurlbert: As to Christian I will object to bringing out the precise location in the city in which she lives. I understand she lives in the city of Detroit but I don't see how bringing out the exact nature of her residence, where her residence is, is at all relevant.

The Court: Is there any reason? Is there a security problem or what is the reason? Let me get at that. Ordinarily the address of the witness is given, of course, but there are cases and the Courts have held many, many times that the Government need not disclose the address of the (319) witness if they have good reason to suspect some security problem or intimidation or something of that kind.

Mr. Hurlbert: We have been concerned about that case in connection with the Kapps' testimony because of certain incidents.

The Court: I know about the Kapps and we discussed that.

Mr. Hurlbert: All right. I have heard of no incidents that have come to light with respect to Helton and Chris-

tian but because of our concern as to the Kapps and because we're dealing in the same case it is our feeling that for security reasons to protect these two young girls it would be better to not have their exact addresses disclosed which might be publicized in the newspapers and subject them to harassment.

Although we have no objection to the disclosure of the fact they live in the city of Detroit, I think you weigh the two factors, the probability of disclosing their addresses and on the other hand the possible subjection of these girls to harassment and I think the possibility that they may be subject to harassment weighs more heavily and I don't think the nature of the exact addresses has to be disclosed to satisfy any probe of defense Counsel. I can't see any legitimate purpose for that question or probe and I don't (320) think Mr. Fink can tell the Court now that purpose that probe does have.

The Court: I have heard that and I asked Mr. Fink and he said that. There is no use repeating it. I have asked Mr. Fink and he is either reluctant to tell the Court why he wants to know this information or he doesn't know of any reason. That is the only alternative and for that reason I think I will sustain the objection of the Government. This is the type of case, and I think the Court can take judicial notice of the fact that a narcotics case involving narcotics of the amount involved in this case are dangerous cases and these pose danger to any witness testifying against the Defendant and especially where these people are co-conspirators and testify to dealing directly with the Defendant or participating in the very object of the conspiracy, one of the objects of the conspiracy and unless you, Mr. Fink, can tell the Court some good reason why you need to know these addresses the Court will sustain the objection of the Government.

Mr. Fink: Judge, it could well be I could go out and have somebody talk to their neighbors and find out they are the biggest liars in captivity and they have a bad reputation in the community for truth and veracity. I don't know where it is going to go and I don't think I have to state (321) a specific reason. I am trying to be candid with the Court but I think the Court knows that every cross examiner doesn't know exactly where every question is going and as far as danger to the witness there is nobody that can ever come into Court and say Collier or East ever threatened anybody.

The Court: No, but the very nature of the case here involved and the fact this Defendant is charged with a substantial amount of narcotics, a large quantity of narcotics in and of itself is the type of case that poses danger to witnesses who testify against the Defendant in cases of this kind and I can take judicial notice of that fact.

Mr. Fink: I take exception to the Court's ruling.

The Court: All right.

Mr. Fink: May I have the benefit of that and Mr. Early's also?

Mr. Early: I assume that applies to me?

The Court: Yes.

Mr. Early: I will not ask the question based on the ruling.

The Court: All right.

Mr. Hurlbert: Both Helton and Christian appeared in the magistrate's Court at a preliminary examination and not once since that point in time has Mr. Fink advised me (322) he intended to conduct a neighborhood inquiry to determine whether or not neighbors knew those witnesses were telling the truth. If he had done so prior to the time of trial then perhaps there might be some foundation for requesting those names and addresses but I think at this point in time Mr. Fink has no basis for those addresses.

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